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No. 00-584

In the Supreme Court of the United States

HANY E. WILLIAM, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

A regulation promulgated by the Attorney General directs that a motion to reopen a deportation or exclusion proceeding "must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened." 8 C.F.R. 3.2(c)(2). The question presented is:

Whether a motion to reopen is timely if it is filed more than 90 days after the final administrative decision, but within 90 days of the Board of Immigration Appeals' denial of a motion to reconsider that decision.

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1-7) is reported at 217 F.3d 340. The decisions of the Board of Immigration Appeals (Pet. App. 8-9, 10-13, 14-22) are unreported.

JURISDICTION

The court of appeals entered its judgment on July 17, 2000. The petition for a writ of certiorari was filed on October 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. By regulation, an alien who has received an administrative adjudication of his claims for relief from deportation or exclusion may file a motion to reopen the

administrative proceeding based on material evidence that "was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 3.2(c)(1). An alien, however, "may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge)," and that motion "must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later." 8 C.F.R. 3.2(c)(2).[1]

2. Petitioner, a citizen of Egypt, entered the United States in 1992 on a student visa. In 1994, the Immigration and Naturalization Service (INS) initiated deportation proceedings against petitioner for failing to comply with the conditions of his non-immigrant status. Pet. App. 2. Petitioner conceded that he was deportable, but requested asylum. The immigration judge denied relief and ordered deportation. *Ibid.* The Board of Immigration Appeals (Board) affirmed the order of deportation on September 24, 1997. *Id.* at 14-22.

Petitioner filed a timely motion to reconsider with the Board, in which he proffered new evidence to support his claim of a well-founded fear of persecution as a Coptic Christian. Pet. App. 11. In that same motion, petitioner also sought to reopen the proceedings to apply for adjustment of status based on his marriage and the possible naturalization of his wife. *Id.* at 12.

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[1] The time limit does not apply to claims for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or the country to which deportation is ordered, if the evidence of changed conditions is material and was unavailable at the time of the original hearing. 8 C.F.R. 3.2(c)(3)(ii).

The Board denied the motion to reconsider on the ground that petitioner had failed to identify evidence of a particularized threat based on religion. *Id.* at 11-12. The Board then denied the motion to reopen on the ground that petitioner had failed to establish prima facie eligibility for adjustment of status and failed to comply with the rules for presentation of such a claim. *Id.* at 12-13.

On July 28, 1998, petitioner filed a second motion to reopen, again seeking relief based on his anticipated eligibility for adjustment of status once his wife was naturalized. Pet. App. 3. Petitioner asserted that his motion was timely because it was filed within 90 days of the Board's denial of his earlier motions to reconsider and reopen. *Ibid.* Because the Board understood petitioner's motion as a request to reopen the Board's decision on his underlying eligibility for deportation—a matter adjudicated in the Board's September 1997 ruling—the Board dismissed the motion as untimely. *Id.* at 8-9.

3. The court of appeals affirmed. Pet. App. 1-7. The court held that the Board reasonably determined that the "final administrative decision" triggering the 90-day time limit in 8 C.F.R. 3.2(c)(2) was the Board's issuance of a final decision dismissing petitioner's appeal from the immigration judge's order of deportation. The court stressed that a motion to reopen seeks to introduce new evidence and thus must be directed to proceedings that were once open for the consideration of evidence. Pet. App. 5. Only the process that led up to the entry of the final order of deportation involved the consideration of evidence, the court explained. *Id.* at 5-6. By contrast, the court concluded, the Board's denial of the motion to reconsider represented only the Board's refusal to disturb the finality of the admini-

strative process and thus did not toll the running of the 90-day limitations period. The court emphasized that the phrase "final administrative decision" in the regulation refers to "the proceeding sought to be reopened," and concluded that the Board's determination that "the proceeding sought to be reopened" refers to the particular stage of the administrative process that the alien seeks to alter, rather than to the entire deportation process as a whole, is not "plainly erroneous or inconsistent with the regulation." *Id.* at 7.

ARGUMENT

Petitioner seeks this Court's review of the court of appeals' decision upholding the Board of Immigration Appeals' interpretation of the regulation governing the filing of motions to reopen deportation proceedings. That issue does not merit further review.

1. Petitioner identifies no conflict in the circuits on that question. Nor are we aware of any. To the contrary, as petitioner concedes (Pet. 18-19), the court of appeals' decision appears to be the first appellate ruling on the question.

2. Petitioner likewise fails to establish a conflict with any decision of this Court. To the contrary, the Board's construction of the phrase "final administrative decision" in the regulation accords with this Court's decision in *Stone* v. *INS*, 514 U.S. 386 (1995). In *Stone*, the Court recognized that a deportation order becomes "final" upon the Board's dismissal of an appeal or the alien's waiver of the right to appeal, *id.* at 390, and held that the filing of a motion to reconsider does not "dislodge[] the earlier proceeding reviewing the underlying order" or otherwise disturb its finality, *id.* at 394. See also 8 U.S.C. 1101(a)(47)(B)(i) (Supp. V 1999) (pro-

viding that an order of deportation becomes final upon the Board's affirmance of the order).

Petitioner places great weight (Pet. 17, 20-21) on the Court's holding in *Stone* that a denial of a motion to reconsider is a separate and distinct final order subject to judicial review. See 514 U.S. at 394-398. But that argument is of no help to petitioner. The INS regulation makes clear that the "final administrative decision" that triggers the 90-day filing period is the final administrative decision "in the proceeding sought to be reopened." 8 C.F.R. 3.2(c)(2). Petitioner's motion did not seek to reopen the Board's consideration of the legal merits of his motion for reconsideration. Rather, the "proceeding sought to be reopened" by petitioner's motion was the underlying proceeding that culminated in the order of deportation, because that is the only proceeding in which his proffered evidence concerning his marital status can be considered and might have relevance. That final administrative decision, however, was issued more than ten months before petitioner filed his motion to reopen, rendering his motion untimely.[2]

3. The court of appeals' decision is correct. The Board's interpretation of the regulation is consistent with its text and purpose. A motion to reopen seeks to

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[2] Furthermore, the court of appeals' deference to the Board's consistent interpretation of the governing regulation is consistent with this Court's decisions. See, *e.g.*, *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); see also 8 C.F.R. 241.31 (providing that an order of deportation becomes final upon the Board's dismissal of an appeal); *In re L-V-K*, Interim Dec. 3409, 1999 WL 607159 (BIA Aug. 10, 1999) (en banc) (holding that the time limit in 8 C.F.R. 3.2(c)(2) on filing motions to reopen begins to run when an order of deportation matures into a final order, regardless of the disposition of subsequent motions), vacated on other grounds, No. 99-71060 (9th Cir. Apr. 3, 2000).

reconvene "deportation or exclusion proceedings," 8 C.F.R. 3.2(c)(2), for the presentation of "new facts that will be proven at a hearing to be held if the motion is granted." 8 C.F.R. 3.2(c)(1). The regulation further directs that the motion cannot be granted "unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 3.2(c)(1).

Because a motion to reopen, by regulatory definition, seeks to inject new evidence into the deportation analysis, the motion necessarily must seek to open a proceeding that is capable of receiving and considering that new evidence. The Board's denial of a motion to reconsider is not fitted for such a task, because it addresses questions of error or oversight in the Board's legal analysis, not consideration of previously unavailable factual evidence that could impact that analysis. Cf. *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 278-279 (1987). In other words, the Board's denial of a motion to reconsider is nothing more than a decision not to disturb the finality of the underlying deportation proceedings.

The Board's and court of appeals' interpretation of the regulation, moreover, comports with the presumption of administrative finality by requiring that reopening be requested shortly after an order of deportation matures into a final order. See, *e.g.*, *INS* v. *Doherty*, 502 U.S. 314, 323 (1992) ("Motions for reopening of immigration proceedings are disfavored * * *. This is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States."); see also *Stone*, 514 U.S. at 399 (noting Congress's "fundamental pur-

pose * * * to abbreviate the process of judicial review . . . in order to frustrate certain practices . . . whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts") (quoting *Foti* v. *INS*, 375 U.S. 217, 224 (1963)).[3]

4. Further review is unwarranted in any event, because the judgment below is correct on an independent ground. At the time petitioner filed his motion to reopen, the Board had already considered and denied one motion to reopen by petitioner. See Pet. App. 12-13. Thus, regardless of its untimeliness, petitioner's second motion to reopen is independently barred by the regulatory prohibition on the filing of successive motions to reopen. See 8 C.F.R. 3.2(c)(2) ("[A] party

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[3] Petitioner's reliance (Pet. 17-18) on the current version of 8 U.S.C. 1229a(c)(6) (Supp. V 1999), which, in addressing motions to reopen, omits the regulatory phrase "in the proceedings sought to be reopened," is misplaced in two respects. First, because petitioner challenges a Board decision issued on or after October 31, 1996, in a deportation case initiated prior to April 1, 1997, the transition rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, govern his case, which makes the current Section 1229a(c)(6) inapplicable, as petitioner himself concedes (Pet. 17). Second, even if it did apply, the amendment offers petitioner no aid because it continues to require the filing of a motion to reopen within ninety days of the final administrative order of removal. 8 U.S.C. 1229a(c)(6)(C)(i) (Supp. V 1999). Nothing in the statute undercuts the established meaning of "final order" as the point in time when an order of deportation becomes administratively final because of the alien's waiver of appeal, the lapse of the time allowed for appeal, or the Board's dismissal of the appeal. See 8 U.S.C. 1101(a)(47)(B) (Supp. V 1999); 8 C.F.R. 3.39, 241.31. In addition, to the extent Congress left the term "final administrative order of removal" undefined, the Board has broad authority to interpret that term. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 423-425 (1999); see also *Lopez* v. *Davis*, 121 S. Ct. 714, 722 (2001).

may file only one motion to reopen deportation or exclusion proceedings."). Petitioner has never contested the applicability of that prohibition or argued that he falls within a recognized exception (see 8 C.F.R. 3.2(c)(3)) to the prohibition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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